

**FEDERAL ELECTION COMMISSION
999 E STREET, N.W.
WASHINGTON, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

MUR: 6311
DATE COMPLAINT FILED: 6/14/2010
DATE OF NOTIFICATION: 6/21/2010
LAST RESPONSE RECEIVED: 8/6/2010
DATE ACTIVATED: 9/21/2010

EXPIRATION OR SOL: 6/9/2015 -
6/16/2015

COMPLAINANT: Democratic Congressional
Campaign Committee

RESPONDENT: Americans for Prosperity

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(a), (f)
2 U.S.C. § 441b
2 U.S.C. § 441d(a)
11 C.F.R. § 100.22
11 C.F.R. § 100.26
11 C.F.R. § 109.21
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter concerns allegations that Americans for Prosperity ("AFP") violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in connection with its broadcasting of television advertisements that criticize three Democratic House members who supported healthcare reform legislation. Specifically, the complaint

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1 alleges that the ads constitute independent expenditures that expressly advocate the defeat
2 of the House members, but that AFP failed to report them to the Commission in violation
3 of 2 U.S.C. § 434 and also failed to include the requisite disclaimers in violation of
4 2 U.S.C. § 441d(a). *See* Complaint at 4-7. The complaint also asserts that even if the ads
5 do not constitute independent expenditures, they may have been coordinated in-kind
6 corporate contributions in violation of 2 U.S.C. § 441b. *See id.* at 7-8. Finally, the
7 complaint alleges that the ad campaign caused AFP to trigger political committee status,
8 but that it failed to register and report with the Commission in violation of 2 U.S.C.
9 §§ 433 and 434. *See id.* at 3-6, 8.

10 AFP maintains that the ads do not contain express advocacy under either
11 11 C.F.R. § 100.22(a) or (b), but rather are genuine issue ads that take a position on a
12 legislative issue and encourage the public to contact their public officials to support
13 AFP's position on that issue. *See* Response at 6-7. AFP notes that there is no reference
14 in the audio portion of any of the ads that reference an election or encourage electoral
15 action, and that the alleged electoral reference in the video portion of the ad is limited to
16 identifying the website, www.novemberiscounting.com, lasts for only three seconds, calls
17 for no action on the part of the viewer with respect to any election, and does not advocate
18 electing, defeating, or supporting or opposing any candidate. *Id.* at 3.

19 As discussed below, while the ads are arguably capable of being read as express
20 advocacy, this is not the only possible interpretation, and we conclude that they do not
21 ultimately meet the Commission's definition under either section 100.22(a) or (b). As
22 such, the ads do not require reporting as independent expenditures, require disclaimers, or
23 cause AFP to trigger political committee status. We also conclude that the available

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1 information fails to support the assertion that AFP made coordinated in-kind
2 contributions by producing and broadcasting the ads. Accordingly, we recommend that
3 the Commission find no reason to believe that AFP violated 2 U.S.C. §§ 433, 434, 441a,
4 441b, and 441d(a), and close the file.

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 **A. BACKGROUND**

7 **1. Organizational History**

8 AFP, founded in 2004, is headquartered in Arlington, Virginia, and is registered
9 under section 501(c)(4) of the Internal Revenue Code. AMERICANS FOR PROSPERITY,
10 <http://americansforprosperity.org/about/legal> (last visited Nov. 22, 2010). AFP is not
11 registered with the Commission as a political committee. AFP maintains that it is
12 "committed to educating citizens about economic policy and mobilizing those citizens as
13 advocates in the public policy process." *Id.*, <http://americansforprosperity.org/about> (last
14 visited Nov. 22, 2010). AFP supports "limited government and free markets on the local,
15 state and federal levels," and "public policies that champion the principles of
16 entrepreneurship and regulatory restraint." *Id.*

17 AFP states that it has 1.5 million activists in all fifty states, including thirty-one
18 state chapters. *Id.* In 2008, AFP reported receipts of \$7,012,051 in its tax returns with
19 the Internal Revenue Service. AFP also reported expenses for communications, ads, and
20 media of \$3,063,611, which comprised 43 percent of its total expenses that year. AFP
21 filed seventeen electioneering communications reports with the Commission during the
22 2010 election cycle that disclosed \$1,311,800.11 in disbursements for production and
23 placement of television and radio spots.

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2. The Ads: "We Won't Forget"

In April 2010, AFP broadcast a series of television ads, entitled, "We Won't Forget," that criticize three Democratic House members – Dina Titus of Nevada, Earl Pomeroy of North Dakota, and Tom Perriello of Virginia – who supported healthcare reform. The content of the ads are identical, but for the members they identify. The ads first aired June 9, 2010, the day following primary election victories by those members, and ran in each congressional district for one week. The ads identify these members by name and with photographs, and discuss the economic consequences of their votes to support healthcare reform. The audio portion of the ads states:

Americans opposed the healthcare takeover, but [House member] ignored us and voted with Nancy Pelosi for big government healthcare.

The cost?

One trillion dollars.

What did you get?

Five-hundred billion dollars in Medicare cuts, tax hikes on businesses, and thousands of jobs lost.

And now, a non-partisan congressional committee says people making less than \$200,000 will pay more in taxes.

[House member] cast [his] vote. Tell [him we] won't forget."

Americans for Prosperity, *We Won't Forget*, YouTube (June 12, 2010),

http://www.youtube.com/watch?v=G25jqQwnjEg&feature=player_embedded.

The closing visual displays a photo of the House member, a phone number to the member's congressional office, and the website address, www.novemberiscoming.com.

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1 A disclaimer at the bottom of the ads states, "PAID FOR BY AMERICANS FOR
2 PROSPERITY." *Id.*

3 The www.novemberiscoming.com website referenced in the ad belongs to AFP,
4 and includes a petition addressed to "Policymakers, Elected Officials, and Candidates"
5 for visitors to complete. See AMERICANS FOR PROSPERITY,
6 <http://www.novemberiscoming.com> (last visited Nov. 22, 2010). The introduction to the
7 petition states, "Make sure your elected officials, policymakers, and candidates know that
8 they should not support big government programs or any other freedom-killing policies."
9 *Id.* The petition states, "You know that November is coming and voters care about the
10 issues. Left-wing policies continue to drive Obama's agenda for even bigger
11 government. We want you to oppose big government programs or any other freedom-
12 killing policies or we will remember in November." *Id.*¹

13 AFP made three \$100,000 ad buys to broadcast the commercials in the respective
14 congressional districts for one week.² See *Americans for Prosperity Warns Titus:*

¹ Visitors signing the petition can select from among four issues to highlight for the recipient(s) of the petition, including: "Support efforts to repeal ObamaCare and replace it with real reform that puts patients first;" "Oppose Cap-and-Trade Energy Taxes and any related EPA regulation;" "Oppose any more Bailouts;" and "Oppose any attempts to regulate the Internet." See AMERICANS FOR PROSPERITY, <http://www.novemberiscoming.com> (last visited Nov. 22, 2010).

² Additional AFP ad campaigns posted online target other Democratic incumbents and congressional candidates. The basic slogan of the ads is a variation of the following: "Tell [House member/candidate] he works for us. Not Nancy Pelosi." Like "We Won't Forget," the audio portion of these ads is accompanied by graphics that display a telephone number and a request for viewers to sign a petition at NovemberIsComing.com. See, e.g., *Americans for Prosperity, Tell Congressman Allen Boyd We Can't Afford Nancy Pelosi's Policies*, YOUTUBE (Aug. 27, 2010), <http://www.youtube.com/watch?v=c310S3q198A>; *id.*, *Tell Rep. Dannelly He Works for Indiana*, YOUTUBE (Aug. 6, 2010), <http://www.youtube.com/watch?v=uT0cD2a1aD0&feature=related>; *id.*, *Tell Skelton He Works for Missouri*, YOUTUBE (Aug. 5, 2010), <http://www.youtube.com/watch?v=vYvXfFpT1Pc&feature=channel>; *id.*, *Tell Mark Sabauer He Works for Us!*, YOUTUBE (Aug. 4, 2010), <http://www.youtube.com/watch?v=DsK5q2yo3cY&feature=channel>; *id.*, *Will Stephens Moore Work for Us?*, YOUTUBE (Aug. 4, 2010), <http://www.youtube.com/watch?v=iFJsHa-vTE&feature=channel>; *id.*, *Tell Betsy Markey She Works for Colorado*, YOUTUBE (Aug. 12, 2010),

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- 1 *'Nevadans Won't Forget' Crucial Vote*, AMERICANS FOR PROSPERITY (June 9, 2010),
2 [http://www.americansforprosperity.org/061010-americans-prosperity-warns-titus-](http://www.americansforprosperity.org/061010-americans-prosperity-warns-titus-%E2%80%98nevadans-won%E2%80%99t-forget%E2%80%99-crucial-votes)
3 [%E2%80%98nevadans-won%E2%80%99t-forget%E2%80%99-crucial-votes](http://www.americansforprosperity.org/061010-americans-prosperity-warns-titus-%E2%80%98nevadans-won%E2%80%99t-forget%E2%80%99-crucial-votes).
4 Production costs for the ads themselves are unknown from the available information.

5 **B. LEGAL ANALYSIS**

6 **1. Political Committee Status**

7 The Act defines a "political committee" as any committee, club, association, or
8 other group of persons that receives "contributions"³ or makes "expenditures" for the
9 purpose of influencing a federal election which aggregate in excess of \$1,000 during a
10 calendar year. 2 U.S.C. § 431(4)(A). To address overbreadth concerns, the Supreme
11 Court has held that only organizations whose major purpose is campaign activity can
12 potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424
13 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986)
14 ("MCFL").

15 In determining whether an organization makes an expenditure, the Commission
16 "analyzes whether expenditures for any of an organization's communications made
17 independently of a candidate constitute express advocacy either under 11 C.F.R.

http://www.youtube.com/watch?v=ANP_JFST94&feature=channel; *id.*, How Can Gary McDowell
Support Nancy Pelosi?, YOUTUBE (Aug. 4, 2010),
<http://www.youtube.com/watch?v=b9UI5UEVV0&feature=related>.

³ The term, "contribution," is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office." 2 U.S.C. § 431(8)(A)(i). *See also FEC v. Survival Educ. Fund Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (holding that a mailer solicited "contributions" under the Act when it left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year."). In the instant matter, the Complaint does not allege or provide any evidence that AFP sought contributions to run the ads at issue.

1 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Political Committee
2 Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601-02 (Feb. 7,
3 2007).

4 a. Section 100.22(a) analysis

5 Under the Commission's regulations, a communication contains express advocacy
6 when it uses phrases, campaign slogans, or individual words "which in context can have
7 no other reasonable meaning than to encourage the election or defeat of one or more
8 clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc.
9 which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R.
10 § 100.22(a). The Supreme Court has held that express advocacy also encompasses
11 communications that contain "'in effect an explicit directive' to vote for or against a
12 candidate." *MCFL*, 479 U.S. at 262. *See also* MUR 5634 (Sierra Club, Inc.) Factual and
13 Legal Analysis at 4 (pamphlet contained express advocacy under section 100.22(a)
14 because it provided "in effect" an explicit directive to vote for the candidates whose
15 positions were in accord with the organization).

16 The fact that a message is "marginally less direct than 'Vote for Smith' does not
17 change its essential nature." *Id.* In *MCFL*, the Supreme Court found that a newsletter
18 which listed candidates for state and federal office and identified their issue positions as
19 supporting or opposing issues such as abortion, along with the phrases, "EVERYTHING
20 YOU NEED TO KNOW TO VOTE PRO-LIFE," "VOTE PRO-LIFE," and the
21 disclaimer, "This special election edition does not represent an endorsement of any
22 particular candidate," constitutes express advocacy. *Id.* at 28.

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1 AFP's ads for "We Won't Forget" do not use any of the words or phrases that
2 urge the election or defeat of one or more clearly identifiable candidates or provide "in
3 effect an explicit directive' to vote for or against a candidate." *MCFL*, 479 U.S. at 262.
4 See also 11 C.F.R. § 100.22(a) (articulating examples of express advocacy). While the
5 opening and closing lines of the ads use the words, "voted" and "vote," both references
6 are to the named House Member's votes, not those of the voting public. Nor does the use
7 of those words provide "in effect an explicit directive" to vote against the identified
8 House Member whose healthcare vote was not in accord with AFP's position. Therefore,
9 we conclude that the ads do not constitute express advocacy under part 100.22(a).

10 b. Section 100.22(b) analysis

11 The Commission regulations further define express advocacy as a communication
12 containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of
13 only one meaning" and about which "reasonable minds could not differ as to whether it
14 encourages actions to elect or defeat" a candidate when taken as a whole and with limited
15 reference to external events, such as proximity to an election. 11 C.F.R. § 100.22(b).
16 The Commission has stated that "communications discussing or commenting on a
17 candidate's character, qualifications or accomplishments are considered express
18 advocacy under section 100.22(b) if, in context, they have no other reasonable meaning
19 than to encourage actions to elect or defeat the candidate in question." *Express*
20 *Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*,
21 60 Fed. Reg. 35291, 35295 (Jul. 6, 1995).⁴

⁴ Further, in *FEC v. Wisconsin Right to Life, Inc.*, the Court stated that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote

1 While the final sentence in the ads ("Tell [him we] won't forget"), coupled with a
2 graphic display of the website (www.novemberiscoming.com) arguably constitutes an
3 eleetoral portion that could be construed as advocating the defeat of candidates who
4 supported healthcare reform, the ads are susceptible to interpretations that would not
5 constitute express advocacy under section 100.22(b). The graphic refers to a website,
6 "www.novemberiscoming.com," and that website contains an electronic petition
7 regarding support for various issues rather than a specifically named federal candidate.⁵
8 See AMERICANS FOR PROSPERITY, <http://www.novemberiscoming.com> (last visited Nov.
9 22, 2010).

10 Second, the exhortation, "Tell [him we] won't forget," is followed by the
11 incumbent's congressional office telephone number, and the "tell him" call to action
12 could be interpreted as a request to call and express disapproval of the vote. The
13 exhortation, therefore does not necessarily direct viewers to vote against the incumbent
14 and may reasonably be understood to be limited to requesting a different position on
15 future legislative votes relating to the issue of healthcare. Indeed, the ads appear to
16 discuss the economic consequences of the members' support for healthcare reform
17 legislation by discussing the total cost of the legislation (\$1 trillion), cuts to Medicare

for or against a specific candidate." 551 U.S. 449, 469-70 (2007) ("*WRTL II*"). See also Coordinated Communications, 75 Fed. Reg. 55947, 55952-53 (Sept. 15, 2010) (adding a new content standard to 11 C.F.R. § 109.21(c)(5) for communications that are the functional equivalent of express advocacy).

⁵ The novemberiscoming.com website implores visitors to "oppose big government programs or any other freedom-killing policies" by asking their elected officials to vote a certain way on issues rather than directing visitors to vote against a particular candidate. Indeed, the language of the petition itself states that "voters care about the issues," and identifies "big government programs" that lawmakers should oppose, including healthcare, energy, financial reforms, and Internet regulations. See AMERICANS FOR PROSPERITY, <http://www.novemberiscoming.com> (last visited Nov. 22, 2010). This petition does not identify specific candidates to support or oppose in the election and thus, does not constitute express advocacy under part 100.22(b).

1 (\$500 billion), tax increases for businesses and those who earn less than \$200,000, and
2 related job losses. The ads also contain no personal attacks on the members. Finally,
3 AFP broadcast the ads after the Democratic primary elections in Nevada, North Dakota,
4 and Virginia, and almost five months before the general election, supporting an
5 interpretation that the ads were meant to influence the incumbents' votes in the months
6 before November. Indeed, a change in position in future voting seemingly would negate
7 AFP's possible opposition to the candidate's re-election.

8 **c. Conclusion**

9 Because the ads did not constitute express advocacy under either 11 C.F.R.
10 § 100.22(a) or (b), AFP did not make "expenditures" that would trigger political
11 committee status or require it to file independent expenditure reports with the
12 Commission. Accordingly, we recommend the Commission find no reason to believe
13 that AFP violated the Act by failing to register and report as a political committee under
14 2 U.S.C. §§ 433 and 434.

15 **2. Disclaimers**

16 The Act requires a disclaimer whenever a political committee makes a
17 disbursement "for the purpose of financing any communication" via broadcast,
18 newspaper, magazine, outdoor advertising, mailing, or other general public political
19 advertising, or when any person makes a disbursement for the purpose of financing
20 communications expressly advocating the election or defeat of a clearly identified
21 candidate . . ." 2 U.S.C. § 441d(a). The regulations further require that "all public
22 communications" made by a political committee must include a disclaimer. 11 C.F.R.

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1 § 110.11(a)(1). A public communication includes any broadcast, cable, or satellite
2 communication, telephone bank, mass mailing, or general public political advertising.
3 11 C.F.R. § 100.26¹¹

4 Because the AFP ads do not include express advocacy, and because there is
5 insufficient information to suggest that AFP otherwise triggered political committee
6 status, no disclaimer is necessary. Accordingly, we recommend the Commission find no
7 reason to believe that AFP violated 2 U.S.C. § 441d(a).

8 **3. Coordination**

9 Finally, the complaint asserts that the ads may be coordinated with opponents of
10 the named candidates and therefore constitute in-kind contributions that either violate the
11 limits set forth by 2 U.S.C. § 441a or the prohibition on corporate contributions set forth
12 by 2 U.S.C. § 441b. *See* Complaint at 7-8. The complaint does not provide any specific
13 evidence of coordination or provide analysis under the payment, content, and conduct
14 prongs of the regulations. Instead, the complaint alleges that because AFP does not state
15 whether the ads were authorized by a candidate or committee, and because it did not file
16 independent expenditure reports to "certif[y] the actual independence" of the ads, they
17 may be coordinated in-kind contributions. *Id.* However, as discussed above, AFP was
18 not required to do either. Accordingly, we recommend the Commission find no reason to
19 believe that AFP violated 2 U.S.C. §§ 441a or 441b.

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III. RECOMMENDATIONS

1. Find no reason to believe that Americans for Prosperity violated 2 U.S.C. §§ 433 and 434;
2. Find no reason to believe that Americans for Prosperity violated 2 U.S.C. § 441a;
3. Find no reason to believe that Americans for Prosperity violated 2 U.S.C. § 441b;
4. Find no reason to believe that Americans for Prosperity violated 2 U.S.C. § 441d(a);
5. Approved the attached Factual and Legal Analysis;
6. Approve the appropriate letters;
7. Close the file.

Christopher Hughey
Acting General Counsel

January 19, 2011
Date

BY: Susan L. Lebeaux
Susan Lebeaux
Acting Deputy Associate General
Counsel for Enforcement

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Philip A. Olaya
Philip A. Olaya
Attorney

Attachments:

- 1 - "We Won't Forget" Script
- 2 - "November is Coming" Petition
- 3 -

**MUR 6311 (Americans for Prosperity)
Television Ad Transcripts**

Americans for Prosperity, *We Won't Forget*, YOUTUBE (June 12, 2010),
http://www.youtube.com/watch?v=G25jqQwnjEg&feature=player_embedded

VOICEOVER:

Americans opposed the healthcare takeover, but [House member] ignored us and voted with Nancy Pelosi for big government healthcare.

The cost?

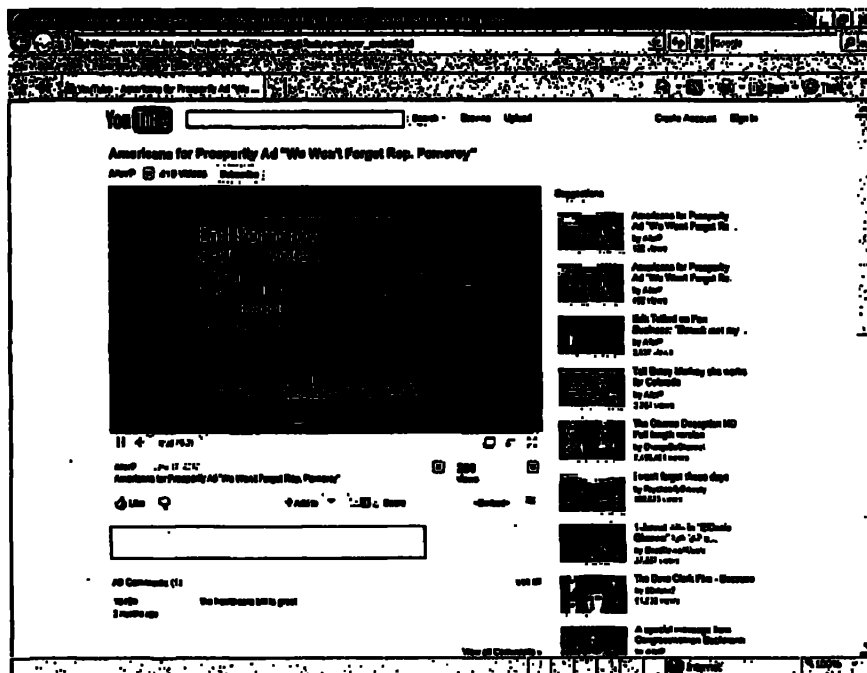
\$1 trillion dollars.

What did you get?

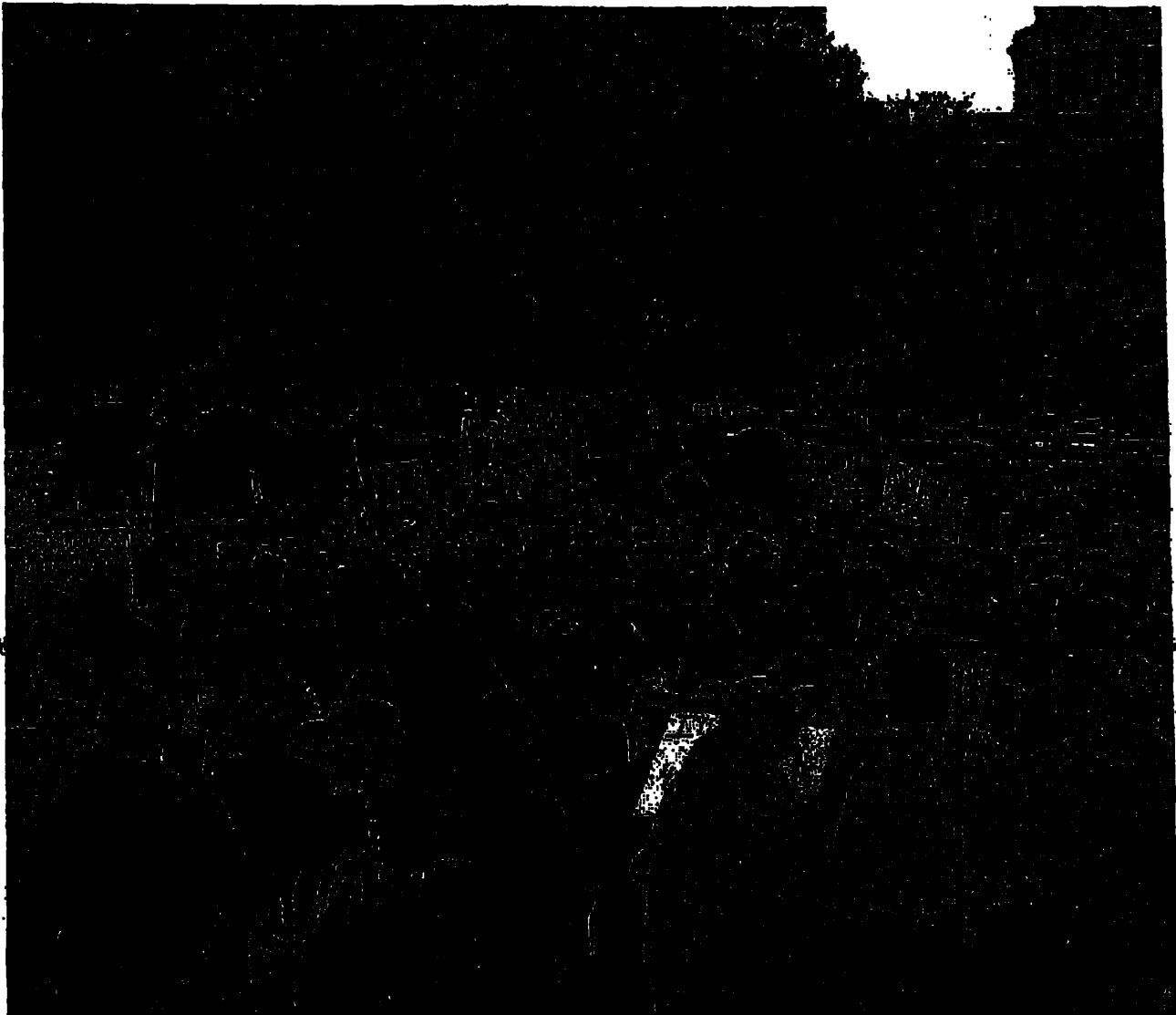
\$500 billion in Medicare cuts, tax hikes on businesses, and thousands of jobs lost.

And now, a non-partisan congressional committee says, people making less than \$200,000 will pay more in taxes.

[House member] cast [his] vote. Tell [him we] won't forget."



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The Petition

The November is Coming Petition

Make sure your elected officials, policymakers, and candidates know that they should not support big government programs or any other freedom-killing policies.

Dear Policymakers, Elected Officials, and Candidates:

You know that November is coming and voters care about the issues. Left-wing policies continue to drive Obama's agenda for even bigger government. We want you to oppose big government programs or any other freedom-killing policies or we will remember in November. You should:

Attachment 2
Page 1 of 2

1. Petition Parts (choose which ones to include on your petition)

- ☐ Support efforts to repeal StimulusCares and replace it with real stimulus that puts patients first
- ☐ Oppose Gap-and-Traffic Energy Taxes and any related EPA regulations
- ☐ Oppose any rules Bailouts
- ☐ Oppose any attempts to regulate the Internet

2. First Name(required)

3. Last Name(required)

4. Email(valid email required)

5. Zip Code(required)

6. Americans for Prosperity is the nation's premier grassroots organization committed to limited government and free market policies.

☐

I would like to join Americans for Prosperity's army of grassroots activists and get on the front line for freedom and receive email alerts. There is no cost to join.

Get Involved Today

Be a Neighborhood Leader Phone Bank From Home Go Door to Door

AFP on Twitter

- Lindsey Graham to Charleston Tea Party last tonight: "I promise I will not vote yes on any policy bills during the lame duck session." 11 mins ago
- Alaska Upset Shows Danger of Energy Taxes: Primary voters in an energy state dumped an incumbent set to chair the ... <http://bit.ly/98K4Gx> 19 hours ago
- Alaska Primary Shows That Energy Taxes Can Be Toxic <http://bit.ly/hjpb4ZO> #not #afp 2010/09/01
- #AFP Blog: A Weekend to Remember with Glenn Beck and AFP: Update from AFP President Tim Phillips Michele Bachmann ... <http://bit.ly/aipN1O> 2010/08/31

From the AFP Site

- **A Weekend to Remember with Glenn Beck and AFP**
Update from AFP President Tim Phillips Michele Bachmann had finished her speech to our 2,500-plus activists on Friday night at AFP Foundation's 4th annual Defending the American Dream Summit. The crowd was still roaring. [CLICK HERE FOR PICTURES AND FOOTAGE](#) read more [...]
- **Defending the American Dream Summit Wrap Up**
Americans for Prosperity Foundation just wrapped up the fourth annual Defending the American Dream Summit yesterday with a great day at Glenn Beck's Restoring Honor Rally. read more [...]
- **2010 Defending the American Dream Summit kicks off in Washington, DC**
2010 Defending the American Dream Summit, day one AFP Foundation's fourth annual Defending the American Dream Summit is off to a roaring start! Tomorrow we will be at Glenn Beck's "Restoring Honor" event. Take a look at our pictures from day one above! [...]

Links

- [Americans for Prosperity](#)
- [Registration Repair Tour](#)
- [Spending Revolt](#)